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Supreme Court, U. S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1689

STANDARD INDUSTRIES, INC., a corporation, and METROPOLITAN PAVING CO., INC., a corporation,
Petitioners,

VERSUS

MOBIL OIL CORPORATION, a corporation, SUNRAY-DX OIL COMPANY, a corporation, KERR-McGEE CORPORATION, a corporation, and PHILLIPS PETROLEUM COMPANY, a corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

(Names and Addresses of Counsel Appear at the Conclusion of Brief)

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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OPINION BELOW

The opinion of the Court of Appeals is reported at 475 F.2d 220. It appears as Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether it is reversible error for a court to instruct a jury in a treble damage case brought under the Sherman and Clayton Acts, without regard to the circumstances of the particular case, that it is the function of the jury to find the actual damages, if any, sustained by the plaintiff, and that it is the function of the court, not the jury, to treble the damages so found and to award costs and attorneys' fees.

THE STATUTE AND RULE INVOLVED

The statutes and rule involved are set forth in Exhibit C to the Petition at pp. xxviii and xxlx.

STATEMENT

This action was instituted by petitioners against respondents and others to recover damages for alleged price fixing in the sale of liquid asphalt in violation of the Sherman Act.

During the trial, which lasted seven or eight weeks, many controversial situations arose which caused the trial court great concern. One such incident was particularly provocative. A Mr. Kavanaugh, who was president of petitioner Metropolitan and a vital cog in the management of petitioner Standard, testified as a witness for petitioners, whose counsel inquired of him concerning the cost and expense incurred in preparing the case for trial and his contribution thereto. The court in two instances sustained objections to such questions, after which the witness

mumbled under his breath that he had borrowed and contributed $150,000.00.

Prompted at least in part by this inexcusable conduct, the court gave an instruction (No. 28) of which petitioners here complain.

The propriety of giving such an instruction is the principal issue here.

ARGUMENT

Petitioners at the outset extol the virtues of the motives which prompted Congress to impose treble damages on a violator, and say that the instruction frustrates the hope, and perhaps, belief that such a penalty would serve as a deterrent to those who might otherwise violate the Acts. It need only be pointed out that a deterrent operates, if at all, before the act, not afterwards.

Petitioners take the position, as they did below, that reversible error occurs when a trial judge, regardless of the circumstances of the particular case, discloses to a jury that under the Acts relied upon by plaintiffs any damages which the jury finds they suffered will be trebled. The court below rejected this contention, notwithstanding a then recent opinion of its own,[1] which, it is said, creates a conflict within the circuit itself with resulting "utter confusion."

The court below saw no conflict, but rather a different record, which reflected ample reasons for giving the in-

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[1] *Semke* v. *Enid Automobile Dealers Association*, 456 F.2d 1361 (1972)

struction. In *Semke* nothing had occurred in the trial court which required or invited such an instruction. Not so here.

Furthermore, the interpretation and application by a Court of Appeals of its own prior decisions does not present an issue which calls for review by this Court.

Attention has been called to what can only be described as gross and deliberate misconduct on the part of the president of one of the petitioners. It was so considered by the trial judge, who explained his reason for giving the instruction of which petitioners here complain by saying:

> "I think (the instruction) might be more justified in this case than in any I know of as tending, maybe, partially to offset the damage that could result from this statement that Mr. Kavanaugh made, which we have discussed fully at other times about his borrowing and spending $150,000.00 in the preparation of this case.
>
> ". . . (T)hat disturbs me no end, the reason that he had twice been admonished not to answer such a question and then mumbling it under his breath, or I didn't hear it, none of the defense lawyers heard it . . ., but one juror did, and if that jury be inclined to say we are going to award him whatever damages he has, plus give him his $150,000.00 back, this instruction might bridle them. . . ." (Ap. 2675-2676)

The court below found additional reasons which it enumerated and discussed at some length. (Page v, Appendix A to the Petition). One of these involved massive publicity (Ap. 3285-3295) which, as the court below pointed out, ". . . stated that the suits involved amounts which were triple the amount of damages allegedly suffered."

As petitioners point out, numerous courts in those jurisdictions in which the pleadings are furnished to the juries have uniformly held that such an instruction is not only proper but necessary. In *Cape Cod Food Products, Inc. v. National Cranberry Ass'n*, 119 F.Supp. 900, 911, Judge Wyzanski instructed the jury that:

> "With respect to damages, you may be somewhat, misled by something that you see in the complaint, and just to avoid any misleading I am going to make explicit one point. You are only to calculate damages, if any, or loss of profits, if any, upon the basis of single, and not treble, damages. It is true that under the antitrust act, if the plaintiff prevails, the judgment which he would ultimately get would be three times the amount of his damages and loss of profits. But the trebling of the amount is no part of the jury's function. That is a question for the court."

It makes no difference whether jurors learn of the fact that the case before them is a treble damage action from the pleadings or from newspapers. It would be a safe bet that more jurors read the newspapers than do the pleadings in a treble damage case. Furthermore, the court below, as it should, attached importance to the Kavanaugh incident, and summarized its analysis of the situation reflected by the record as follows:

> "It was in this general setting, i.e., considerable pretrial publicity, some discussion about treble damages in closing arguments, and misconduct by the witness Kavanaugh, that the court felt constrained to affirmatively instruct the jury that in the event it found for the plaintiffs it should award the plaintiffs their actual damages, and that the matters of trebling, costs and

> attorney's fees were 'no part of the jury's function' and were 'questions' for the court. *Under such circumstances*, we conclude that the giving of the instruction in question did not constitute reversible error. Repeating, the jury was correctly instructed as to the damages that could be awarded and then simply informed that the other matters, i.e., trebling, costs, and attorney's fees were 'questions' for the court. We perceive no prejudice to the plaintiffs from the instructions thus given." (Emphasis supplied.)

There is no conflict between the Court's decision in this case and that of any other circuit. On the contrary, the only two Court of Appeals decisions—the one here and that in *Bordanaro Brothers Theatres, Inc.* v. *Paramount Pictures, Inc.*, 203 F.2d 676 (2nd Cir., 1953)—are completely harmonious. In *Bordanaro* the Court pointed out that one of the assignments of error involved references by the court and counsel to a former case and treble damages, and said:

> "Surely reference either to the pleadings or to the governing statute is so usual a course in jury trials as to occasion no comment. Hence the recital in the trial judge's charge of just what had happened in the former action and what was claimed in this suit was quite appropriate. Such a statement is more desirable than a half-recital, with attempted concealment of a part—a method leading inevitably to an overemphasis of an otherwise not significant detail."

Neither is any conflict demonstrated among the districts. It is true that different results have been reached by some of the District Courts, but none have unequivocally adopted the rule here sought by petitioners. As a matter of

fact, those courts which have frowned upon a disclosure of the trebling provision of the Clayton Act have taken pains to point out that differing circumstances justify different conclusions. In fact, the cases on which petitioners rely support the conclusion reached by both the trial court and the Court of Appeals in the instant case.

In *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 135 F.Supp. 4, 11, Judge Holtzoff pointed out:

> "There may be some reason for imparting the information to the jury in those districts in which it is customary to supply the pleadings to the jury in civil cases, because otherwise the jury on reading the prayer for relief might be confused by the demand for triple damages and might be perplexed by a doubt whether it was its duty to multiply the actual damages by three."

The Court of Appeals reversed a judgment for plaintiff, and therefore did not examine or decide the question here. 243 F.2d 418 (C.A.D.C. 1957).

In *Sablosky* v. *Paramount Film Distributing Corporation*, 137 F.Supp. 929 (D.C.E.D. 1955), Judge Grim adopted the conclusion and reasoning of Judge Holtzoff, including that portion quoted above which was incorporated in his opinion.

Instead of conflict and confusion which petitioners assert exists, it appears that all of the courts recognize and affirm that there may be and are good and sufficient reasons under varying circumstances for revealing to a jury, rather than concealing from it, the provisions of the controlling statute law.

Here both the trial and appellate courts found the existence of such reasons. Both were right.

In their "Conclusion," petitioners assert that if the giving of the instruction constituted reversible error, they should have a new trial ". . . limited solely to the issue of damages." The only reason offered in support of such a contention is the assertion that if the instruction was erroneously given, ". . . it could *only* prejudice the plaintiffs with regard to the *amount* of their recovery."

Such conjecture finds no support in the record. The jury did what juries are supposed to do. It weighed conflicting evidence and arrived at a verdict determining the damages sustained by petitioners. The Court of Appeals rejected the contention here made, simply pointing out:

> "The extent of plaintiffs' damages was, as were most of the issues in the case, disputed issues and the jury's monetary award finds support in the record."

No resort to the record is necessary to support this conclusion. It should suffice to note petitioners' statement that, "There was evidence from which the jury could have easily determined that the overcharge was 3¢ per gallon." It can hardly be seriously contended that the evidence compelled a finding by the jury of what petitioners say it might have found.

CONCLUSION

Unless the Court is prepared to say that in no case such as this is it proper to advise a jury of the provisions of the Act on which plaintiffs rely, including the trebling feature, no matter what the circumstances are, the judgment of the Court of Appeals on the issue here is right, and the Petition should be denied.

Respectfully submitted,

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